SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 534.

LESLIE C. STALLINGS, APPELLANT,

vs.

MAURICE SPLAIN, UNITED STATES MARSHAL IN AND FOR THE DISTRICT OF COLUMBIA, APPELLEE.

BRIEF FOR APPELLANT.

Statement of the Case.

Leslie C. Stallings, appellant, and hereinafter in this brief called petitioner, was arrested on the 10th day of June, 1918, in the District of Columbia, by the appellee, Maurice Splain, United States Marshal in and for the District of Columbia, upon a warrant issuing out of the District Court of the United States for the District of Wyoming on the 15th day of May, 1918, charging the said Leslie C. Stallings with having committed "embezzlement of moneys in connection with land office matters (8 counts)," in "violation of sec. 97, F. P. C. 1910." On the 11th day of June the

petitioner filed in the Supreme Court of the District of Columbia his petition for the writ of *habeas corpus*, alleging in substance his arrest on the day and year aforesaid, at the District aforesaid, upon the warrant aforesaid, and that he had not been accorded due process of law as to notice of the alleged charges against him. Upon the said petition a writ of *habeas corpus* issued, June 11, 1918, to the appellee herein, commanding him to have the body of the said petitioner in Criminal Court No. 2, Emery Building, City of Washington, immediately after the receipt of the said writ upon him. No return was filed by the appellee to this writ until the 16th day of July, 1918, and at that time appellee set up substantially the facts of the arrest and obedience of appellee to the mandate of the writ in producing the body of the petitioner as in said writ commanded, a continuance of hearing upon said writ to a future time, and petitioner's release under bail bond in the sum of $2,000.00, conditioned for his future appearance for hearing as aforesaid. The return then averred substantially the facts which constitute the basis of this appeal.

Prior to hearing had upon this writ of *habeas corpus*, however, and while petitioner was under bail and on liberty upon his bond, on the 27th day of June, 1918, a sworn complaint was made before Isaac R. Hitt, a United States Commissioner in and for the District of Columbia, by Frank M. Helan, a United States Deputy Marshal under appellee, upon which the said Isaac R. Hitt issued his warrant of arrest of even date with said complaint, and on the 5th day of July, while the petitioner was still at liberty on the bail bond pending the hearing on the writ of *habeas corpus* aforesaid, he was a second time arrested by F. L. Hudson, a United States Deputy Marshal under appellee, this time upon the warrant issued by the said United States Commissioner but setting forth the same charge and the alleged commission of the same offense as set out in the original warrant upon which petitioner was arrested June 10, 1918. On July

5th a hearing was had before the United States Commissioner to determine whether there existed probable ground to believe petitioner guilty as charged. There were produced in evidence a certified copy of the indictment, the original bench warrant and certain letters, which, together with your petitioner's admission of his identity, and of the fact that he was a United States Commissioner for the District of Wyoming at the times charged in the indictment, constituted the sole evidence upon which the Commissioner could have found probable cause to believe petitioner guilty of the charge alleged.

On the same day, it appearing to the Commissioner that the laws of the United States had been violated as charged in the complaint, and that probable cause had been shown to believe petitioner guilty of the alleged offense, it was ordered that petitioner give bond in the sum of $2,000.00 for his appearance before the United States District Court in and for the District of Wyoming, which was accordingly done. On the 8th day of July petitioner filed before the Commissioner his motion to vacate and set aside his order compelling petitioner to give said bond, setting up his arrest and release on *habeas corpus*, continuance of the hearing thereon to July 16, 1918; likewise the issuance of the Commissioner's warrant upon the sworn complaint while the *habeas corpus* proceedings were still pending and unheard, and praying that, in view of the foregoing facts, he, the said Commissioner, should enter an order setting aside the order of commitment and fixing bail passed as hereinbefore set out.

This motion was denied, and then petitioner, on the 18th day of July, 1918, filed in the Supreme Court of the District of Columbia his petition praying for the issuance of a writ of certiorari to Isaac R. Hitt, United States Commissioner in and for the District of Columbia, to certify to the said Supreme Court the proceedings in the case of your petitioner, and all things touching the same. The writ issued in accordance with this petition on the 18th day of July, 1918, and respondent certified the proceedings in the cause and

all things touching the same, as fully set out in the record, pages 10 to 25, inclusive. On July 25th hearing was had not only upon the petition for the writ of *habeas corpus*, the writ issued thereon, the return thereto, and the demurrer to said return filed by petitioner, but also upon the petition for the writ of certiorari, the writ and return thereto; and, on August 20, 1918, there was passed an order overruling petitioner's demurrer to the return to the writ of *habeas corpus*, dismissing the petition for the said writ of *habeas corpus*, and discharging the writ issued thereon. To this action of the court in overruling petitioner's demurrer and dismissing the petition for the writ and discharging the writ itself, petitioner, by his counsel, duly excepted.

In the same order the court dismissed the petition for the writ of certiorari and the writ issued thereon and remanded to the respondent, Isaac R. Hitt, aforesaid, the proceedings certified in his return to the writ aforesaid. To this action of the court, petitioner, by his counsel, duly excepted and the cause was carried before the Court of Appeals of the District of Columbia upon the six errors (Rec., p. 28) assigned. The cause was duly heard by the said court, and the judgment of the lower court was sustained (Rec., pp. 30-32). From that judgment under an appropriate order an appeal has been prosecuted to this court under nine assignments of error (Rec., p. 35), and which are stated as follows:

Assignment of Errors.

1st. The court erred in its judgment that appellant's arrest and detention on June 10, 1918, was made under and by authority of the provisions of section 930 of the Code of Laws for the District of Columbia.

2nd. The court erred in its judgment that the United States Commissioner had jurisdiction of the person of appellant previous to the full and final determination of the merits of the writ of *habeas corpus* under which he was re-

leased from prison under good and sufficient bail on June 11, 1918.

3rd. The court erred in its judgment that the appellant waived any of his legal rights as embraced in the writ of *habeas corpus* by giving bail in compliance with the alternative order of the United States Commissioner on July 5, 1918.

4th. The court erred in its judgment that the preliminary arrest on June 10, 1918, and the discharge of appellant's writ thereunder was regular and legal.

5th. The court erred in its failure to consider and sustain appellant's assignment of error No. 3, which alleged "the court erred in overruling defendant's plea that the allegations of the respective counts in the indictment failed to charge a crime against any law, of laws of the United States, and especially against the provisions of section No. 97 of the Criminal Code of the United States."

6th. The court erred in its failure to consider and sustain appellant's assignment of error No. 4, which alleged "the court erred in overruling defendant's plea that the United States Commissioner is not an officer of the United States within the meaning of section No. 97 of the Criminal Code of the United States."

7th. The court erred in its failure to consider and sustain appellant's assignment of error No. 5, which alleged "the court erred in overruling defendant's plea that the ownership of the respective sums of money alleged to have been embezzled is not set forth with sufficient legal precision as to advise him fully in respect thereto."

8th. The court erred in its failure to consider and sustain appellant's assignment of error No. 6, which alleged "the court erred in directing Isaac R. Hitt, United States Com-

missioner, to return his transcript of proceeding in this cause, together with the original bond, into the United States Court for the District of Wyoming, prior to the final disposition of this said cause on appeal."

9th. The court erred in its failure to consider and sustain appellant's assignment of error No. 1, which alleged "the court erred in overruling defendant's demurrer."

ARGUMENT.

Assigned Error 1.

The lower court states in its opinion that this appellant was arrested, held and removal directed to a foreign district of the United States under section 930 of the Code of Laws of the District of Columbia. It is respectfully submitted that the said section is wholly foreign to an arrest made under any process of the United States, and is only applicable to those persons who may be arrested within the District of Columbia charged with a crime against the laws of the States of this Union. Defendants charged with crimes against the laws of the United States are arrested and their removal to a foreign district provided for under section 1014 of the Revised Statutes. A judge of the Supreme Court of the District of Columbia, with respect to the *extradition* and *removal* of those under arrest for the violation of State laws or United States laws, sits, so to speak, in a dual capacity. When the violation of the law of the State is involved the judge, in the matter of extradition, must act within the narrow and prescribed limits which would surround the Governor of another State in such an application. When the violation of a law of the United States is involved, then a judge of the Supreme Court of the District of Columbia sits in the broad sphere of a judge of a district court of the United States. When sitting as a Governor, a judge of the Supreme Court of the District of Columbia must observe all the narrow confines of a Governor

with respect to the laws of a demanding State, and therefore is not permitted to consider the force, power and effect of informalities and prescribed requisites for the successful charging of a crime; but must accept as a general rule the papers of the demanding State at their face value. When this judge is sitting in a removal case in response to the request of a Federal district he is authorized to view all the papers from every legal standpoint, because he is sitting as an equal with the judge before whom the defendant must be tried, and is equally interested in the proper construction of the laws of the United States. It is his plain duty to dismiss under *habeas corpus* proceedings where the submitted papers do not legally charge a crime against the laws of the United States; otherwise, defendants would often be subjected to great hardships by transportation across the continent only to be dismissed from further proceedings because the Government under the allegations could not sustain the charge that a crime had been committed.

The District of Columbia is a district of the United States within the meaning of section 1014, authorizing the removal for trial of a person charged with an offense against the United States to the Federal district where the trial is to be had. Benson *vs.* Hinkel, 198 U. S., 1; U. S. *vs.* Hyde, 199 U. S., 62.

Assigned Error 2.

The court erred in overruling the contention of petitioner to the effect that the United States Commissioner was wholly without jurisdiction to act in the cause during the pendency of an application for discharge on *habeas corpus* in the Supreme Court of the District of Columbia, and which in no manner had been heard on its merits.

Reference to the record will show that the petition for *habeas corpus* was filed in this cause on the 11th day of June, 1918, and from that date, by proper order of court, hearing upon the merits was continued to and until the 25th day of July, 1918, during which time petitioner was

admitted to bail. During the pendency of this hearing, proceedings before the United States Commissioner were instituted by swearing to the written complaint of June 27, 1918, and issuance of warrant upon said complaint by the Commissioner; and on the fifth day of July, petitioner was again arrested on a warrant, which, as is set forth in this record, charged the petitioner with having committed substantially and in fact the same offenses, provable by the same facts, against the same sovereignty, and in the same jurisdiction, as formed the basis of the charge set out in the original warrant, which then awaited the determination of the Supreme Court of the District of Columbia in a hearing not yet had. It is submitted that the Commissioner's conduct in thus issuing a warrant while there was still pending a hearing before the Supreme Court of the District of Columbia upon a writ of *habeas corpus* issued on a petition raising the legality of petitioner's arrest under practically and identically the same charge was without jurisdiction; for pending this hearing upon the writ of *habeas corpus*, the petitioner was under the control and direction of the Supreme Court of the District of Columbia. He was then detained, not under the original commitment, but under the authority of the writ of *habeas corpus*, and, up and until a final hearing upon the merits of the petition had been had, he was so completely and fully within the jurisdiction and control of the Supreme Court of the District of Columbia that the United States Commissioner could not under the law virtually deprive the Supreme Court of the District of Columbia of its jurisdiction by arresting, as he did, the petitioner, and holding him to bail in the removal proceedings. That petitioner was under the control and direction of the Supreme Court of the District of Columbia was decided as early as the case of Barth *vs.* Clise, 12 Wall., 400; 20 U. S. (L. Ed.), 393. And that the United States Commissioner was equally without jurisdiction in the proceedings which he instituted and conducted from the 27th day

of June through the 8th day of July, is equally established on principle.

A similar question was raised in the case of *In re* Farez, 8 Fed. Cases, page 1006, case No. 4644, in the Circuit Court of the Southern District of New York. In that case it was distinctly held that the petitioner must be considered as having been under and in the custody of the court issuing the writ of *habeas corpus* at least from the time the writ was served on the marshal, and that the marshal had no right after that time, and during the pendency of the writ, to arrest Farez upon any warrant not in his hands at the time the writ was served upon him. In stating the rights of Farez the court said:

> "The writ of *habeas corpus* having been issued on the 6th of November, commanding the marshal to produce the body of Farez on the 10th of November, at 11 o'clock a. m., Farez must be considered as being, under said writ, in the custody of the court, at least from the time the writ was served on the marshal, and the marshal had no right, after that time, during the pendency of the writ, to arrest Farez upon any new warrant, or upon any warrant not in his hands at the time the writ was served upon him. The return by the marshal, at the day and hour specified in the writ as the time for the return thereof, states that he arrested Farez on the 10th of November under a warrant dated on the 9th of November. It appears in evidence that the writ was served on the marshal prior to the time when he arrested Farez under the warrant of the 9th of November. Such arrest, on the second warrant, was, therefore, illegal. Farez was entitled to have the question determined as to the lawfulness of his imprisonment and detention by virtue of the process on which he was claimed to be held at the time the writ of *habeas corpus* was served on the marshal. The proceedings under the writ had relation to at least as early a period as that. When the question of the lawfulness of the detention under the first warrant should have been disposed of, then the marshal could proceed to execute the second warrant, but not before."

It is submitted therefore, that the warrant of the United States Commissioner was illegal, null, and void, that he acquired no jurisdiction over petitioner, and that his entire proceedings were void and of no effect.

Assigned Error 3.

It surely cannot be successfully contended that this appellant waived any right to which he was entitled under his original application for writ of *habeas corpus* after he was seized by a Deputy United States Marshal, carried before a United States Commissioner, and there ordered held for removal to a foreign district, by giving bail instead of being incarcerated in prison to await an ordeal for removal. Appellant had sought the great protecting power afforded by the writ of *habeas corpus*, and he was awaiting a judicial determination of his rights thereunder when his person was seized a second time on the original charge. His second arrest prior to a full judicial determination of the legality of the first arrest is so foreign to the rights of an applicant for a writ of *habeas corpus* that any reasonable steps taken by himself to avoid imprisonment and removal to a foreign district surely were fully justified under all of the facts.

Assigned Errors 4 and 5.

The merits of the assigned errors 4 and 5 are involved in the general discussion of the remaining seven errors, and therefore an argument here it is believed would be mere surplusage.

Assigned Error 6.

The sixth assignment of error is based upon the court's action in overruling petitioner's contention that the allegations of the respective counts in the indictment failed to

charge a crime against any law or laws of the United States, and more particularly against the provisions of section 97 of the Criminal Code of the United States, and also the court's action in overruling the petitioner's contention that the ownership of the respective sums of money alleged to have been embezzled was not set forth with that legal precision requisite to advise him fully in respect thereto.

Record, pages 17 to 22, inclusive, sets forth the indictment offered in the proceedings by the United States Commissioner, and which, together with the petitioner's admission as to his identity and the fact of petitioner's being a United States Commissioner at the times alleged in said indictment, constituted the sole evidence upon which the Commissioner could find probable cause that petitioner herein was guilty of the crime alleged. The indictment is in eight counts, each similar to the other, and an examination of the language of one is decisive of the questions raised with regard to them all. A reading of each and every count shows that the charge in substance against petitioner was that on a certain date in 1917, while he was a resident of the town of Encampment, in the State of Wyoming, and "then and there United States Commissioner in and for the district of Wyoming, duly appointed, qualified, and acting as such Commissioner, did, by virtue and under color of his said office as United States Commissioner, and while he was so acting as such officer, received and had in his possession, and under his control, certain moneys * * * which said moneys, he, the said Leslie C. Stallings, had received as such United States Commissioner from one * * * to be paid over to the receiver of the United States Land Office, at Cheyenne, in the State of Wyoming, and he, the said Leslie C. Stallings, then and there the said moneys aforesaid, did unlawfully convert to his own use, and fraudulently embezzle, against the peace and dignity of the United States, *et cetera*." It is submitted that this charge on its face proves that petitioner could not, under the law, have been guilty of not only any crime but more particularly any

crime against the United States, and especially under section 97 of the Criminal Code of the United States, for the reason that: First, the charge on its face shows that petitioner did nothing *as an officer of the United States* which would bring him within the inhibition of section 97 of the Criminal Code aforesaid, and that if he had been guilty of an embezzlement or a fraudulent conversion of moneys coming into his hands, the embezzlement and fraudulent conversion were made not contrary to any Federal Statute, but if any, against the peace and dignity of the State of Wyoming; and that petitioner, if he ever were guilty of an embezzlement or fraudulent conversion, was so not in his capacity as a United States Commissioner but in his private capacity, as an agent, employee, attorney, or what not of some private individual, who had entrusted to him moneys for a use or under a trust not contained within his duties, rights, or powers as a United States Commissioner; second, the charge on its face sets forth the commission of no offense, in that in no place in said charge is there contained any allegation of ownership sufficient to make out the offense of embezzlement therein alleged. Third,

While it has been so often held that in a removal proceeding the insufficiency of an indictment will not be inquired into, and that that is a question to be decided by the court in which the indictment was found, and that technical objections and criticisms growing out of the artificial and often strained scrupulousness of criminal procedure are to be left to the court in whose jurisdiction the indictment is found, provided the said indictment itself contains a narration of events and acts which tends to establish the existence of the offense said to be charged; nevertheless, it is equally true that where upon a broad, liberal, and inartificial construction of the language of the indictment it does not appear that any offense against the laws of the United States has been committed, section 1014 of the Revised Statutes does not apply and the prisoner should not be held for re-

moval. *In re* Benson, 131 Fed. Rep., 968, 969; Tinsley *vs.* Treat, 205 U. S., 20; Hard *vs.* Splain, 45 D. C. Appeals.

It is submitted there is nothing contained in the allegations of any of the counts of the indictment contained within this record which shows any crime to have been committed. When an indictment found in the trial district charges no offense against the laws of the United States the court is not justified in ordering removal. Greene *vs.* Hinkel, 183 U. S., 249; *in re* Wolf, 27 Fed., 606; *in re* Corning, 51 Fed., 205; *in re* Terrell, 51 Fed., 213; *in re* Greene, 52 Fed., 104; *in re* Doig, 4 Fed., 193; *in re* Buell, 4 Fed. Cas., #2102, and all such matters may be inquired into and determined by a district judge on an application for removal either when the motion for a writ of removal is pending, and on such motion, or by *habeas corpus*. U. S. *vs.* Rogers, 23 Fed., 658.

A United States Commissioner cannot receive money from anybody to be paid over to the receiver of any United States land office, as United States Commissioner. He may while holding the office of a United States Commissioner perform acts for which he may be rendered liable under the Criminal law, but those acts may be either within his jurisdiction and right or without his jurisdiction and without his right as a United States Commissioner. And it is not difficult to determine how far he may act as commissioner insomuch as the office and his jurisdiction, duties, and rights are alike determined by statute. Nowhere will it be found that he "as such United States Commissioner" can receive money from anyone "to be paid over to the receiver of the United States Land Office," at any point. It is surmised that the charge has reference to section 2294 of the U. S. Revised Statutes as amended by the act of March 4, 1904 (33 Stat., 59), but a reading of that act gives to a commissioner no other authority or right in and about land matters other than taking certain proofs, affidavits, and oaths required to be made by applicants and entrymen under the homestead and similar acts. The act gives him no authority to receive

money to transmit the same to the General Land Office. It specifies the fee he may charge for taking an affidavit, *et cetra,* but in nowise makes him a receiving agent of the United States for the purpose of the transmission of whatever fees may be required at the General Land Office or other work. The powers of the United States Commissioner may be generally enumerated as follows:

1. To issue warrants for offenders against the United States, cause them to be arrested, imprisoned, or bailed for trial.

2. To order them removed to other districts (U. S. Rev. Stats., 1014, Comp. Stats. (1913), sec. 1674.

3. To hold to security of the peace and for good behavior. U. S. Rev. Stats., sec. 727, Comp. Stats. (1913), p. 536.

4. To carry into effect the awards of foreign consuls. Comp. Stats., 1913, sec. 1248.

5. To sit as arbitrator between the captains and crews of vessels belonging to the United States, whose interests are committed to his charge, and to enforce his decisions in regard thereto. Comp. Stats. (1913), sec. 1248.

6. To take bail and forfeitures in civil cases. U. S. Rev. Stats., 945.

7. To discharge poor convicts imprisoned for non-payments of fines. U. S. Stats., sec. 1042.

8. To take certain acknowledgements. U. S. Rev. Stats., sec. 1778.

9. To institute proceedings under the laws relative to crimes against the elective franchise and civil rights of citizens, and to appoint persons to execute warrants thereunder. Comp. Stats. (1913), secs. 3935 and 3938.

10. To issue search warrants in Internal Revenue. Comp. Stats. (1913), sec. 8380.

11. Customs. Comp. Stats. (1913), sec. 5769.

12. Counterfeiting cases. Comp. Stats. (1913), sec. 10143.

13. To issue warrants for deserting foreign seamen. Comp. Stats. (1913), sec. 8389.

14. To summon masters of vessels to show cause why process should not issue. Comp. Stats. (1913), sec. 8335.

15. To issue warrants for, and examine, fugitives from justice. Comp. Stats. (1913), secs. 10110, 10114.

16. Try cases arising under the Chinese exclusion acts.

17. To take depositions *de bene esse* and depositions to file.

18. To issue a warrant in a proper case for the arrest and imprisonment of the judgment debtor on an execution issued out a Federal court. Hayes *vs.* Canada, 184 Fed., 821.

19. To hear and determine applications for the discharge or arrest on mesne process out of Federal courts. Hayes *vs.* Canada, 184 Fed., 821.

20. When directed so to do, to conduct the summary investigations upon petitioners for remission of fines for violations of the customs-revenue laws. Comp. Stats. (1913), sec. 10133.

In none of the hereinbefore enumerated powers, duties, rights, and jurisdiction of United States commissioners can there be found any basis for the charge that a United States Commissioner can, *as such*, receive money from another to pay over that money *as such United States Commissioner* to a third person, so that in the event the said Commissioner should fraudulently convert the said money to his own use he can be charged as a United States officer with having

embezzled moneys under section 97 of the Criminal Code of the United States.

A similar question to the one at bar arose in the case of *In re* James, 195 Fed., 981, under proceedings for revocation of the appointment of a United States commissioner, and the cause dismissed on the ground that services similar to the ones rendered as set out in this indictment, if they were so rendered or undertaken to be rendered, were "rendered as an employee and not as an officer," and it was therein held that the commissioner had the right under the statute to charge and be compensated for services done under precisely the same act as it is surmised form the basis for the charge set forth in this indictment.

Assigned Error 7.

But it is submitted that even if it could be, and it is urged that it cannot be, construed that petitioner received the money "by virtue and under color of his said office as United States Commissioner, and embezzled and fraudulently converted the said moneys to his own use," still notwithstanding these facts, if they were facts, there is no sufficient allegation of ownership contained within any of the said counts aforesaid in this indictment to constitute any legal offense upon which probable cause could be found that the petitioner was guilty of any alleged offense. The allegation recites in substance in each and all of the counts that petitioner did, "while he was so acting as such officer, receive and have in his possession and under his control, certain moneys to a large amount * * * which said moneys, he, the said Leslie C. Stallings, had received as such United States Commissioner * * * to be paid over to the receiver of the United States Land Office * * * he, the said Leslie C. Stallings, then and there the said moneys aforesaid, did unlawfully convert to his own use and fraudulently embezzle." It is elementary that in any in-

dictment for embezzlement the allegation of ownership of the property alleged to have been embezzled must be averred, with the same precision as in an indictment for larceny.

Bishop's New Crim. Procedure, 2nd ed., vol. 3, sec. 320.
9 R. C. L., p. 1291.
15 Cyc., 517.
Clark's Criminal Procedure, 2nd ed., 267.

It is submitted that nowhere in the indictment is the ownership of the moneys alleged to have been embezzled set forth with that degree of precision and certainty required under the law, or averred with even that sufficient particularity to negative the presumption that the money could have belonging to the petitioner himself. Averments of unlawful conversion and fraudulent embezzlement do not reach back to cure the essential defect of earlier failure to sufficiently aver ownership, and this indictment carries on its face the earmarks of its own nullity in each and every count, by its failure to contain this essential averment. It is submitted, therefore, that upon the broadest construction which can be given to the indictment, it does not set forth facts which tend to allege any offense committed against the laws of the United States, and more particularly section 97 of the United States Criminal Code; that this could not, therefore, have formed that legal evidence requisite as a basis for the finding of probable cause, and insomuch as the indictment was practically the sole evidence upon which probable cause could have been found, the Court erred upon the hearing on the writ of certiorari in refusing to quash and hold null and void, and of no effect, the entire proceedings before the commissioner. And it further erred in refusing to hold that the respective counts in said indictment failed to charge any crime, in that the ownership of the respective moneys alleged to have been embezzled was not set forth with sufficient legal precision.

Assigned Error 8.

As urged elsewhere in this brief, it is believed that the whole of the proceedings before the United States Commissioner—the issuance of the warrant, the arrest of the Appellant, the finding of probable cause, and the acceptance of bail bond—were wholly void and of no effect, and therefore the transcript of the proceedings therein should not have been forwarded to the proper authorities in the foreign District. Such official records should have been retained in the custody of the Supreme Court of the District of Columbia until the final adjudication of all the questions involved in this controversy as to the rights of the appellant.

Assigned Error 9.

This assignment is based upon the court's action in overruling the petitioner's demurrer. The demurrer, as set forth (Record, p. 26) was filed to the marshal's return to the writ of *habeas corpus* set out in Record, page 3. The demurrer proceeded upon the grounds, first, that the said return was substantially insufficient, in that no facts were set forth therein sufficient in law to warrant the action taken by the United States marshal as set forth by him in said return, and, second, that neither the warrants nor the indictment as shown by the certified copy thereof, filed in the cause, were sufficient in law to warrant the restraining of the applicant in any manner. The return of the appellee herein to the writ of *habeas corpus* aforesaid (Record, p. 3) simply sets forth the fact of the arrest of petitioner on June 10, 1918, appellee's production of the body of the petitioner in obedience to the writ on the 11th day of June, 1918, the continuance granted by the court for hearing on said writ; the subsequent complaint before the United States Commissioner, June 27, 1918, the issuance of his warrant and the arrest of said petitioner July 5, 1918, and petitioner's voluntary appearance and ad-

mission of his identity and former official character as described in the said complaint; the evidence produced before the commissioner and petitioner's admission to bail for his appearance as hereinbefore set out. The discussion of Assignment of Error No. 2 has proven the substantial insufficiency of this return in that the second warrant issued was null and of no effect, as it issued during the pendency of the hearing upon the writ of *habeas corpus* in the Supreme Court of the District of Columbia which had not been had. The discussion of Assignments of Error 6 and 7 has so disposed of the sufficiency of the indictment as matter of law that any further discussion of this assignment is unnecessary. It is submitted, therefore, that to this return the demurrer should have been sustained, that it did not contain within it facts and averments legally sufficient to warrant the action of the marshal in his conduct toward petitioner, and did not contain any legal reasons for the course of action taken; that it showed upon its face a line of conduct taken subsequent to the 11th day of June, which was unlawful, in derogation of the jurisdiction of the Supreme Court of the District of Columbia over petitioner, and in disregard of his rights under the order of continuance granted him for hearing on the merits of the writ.

CONCLUSION.

It is submitted that, upon all the matters raised by the Assignments of Error in this record, the court committed serious and substantial error to the disadvantage of petitioner in the court below and that the case should be reversed and remanded with instruction that all proceedings before the Commissioner be quashed and that petitioner's prayer for release on the original writ be granted.

Respectfully submitted,

WILLIAM B. JAYNES.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

LESLIE C. STALLINGS, APPELLANT,
v.
MAURICE SPLAIN, UNITED STATES MARSHAL in and for the District of Columbia. } No. 534.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF THE APPELLEE.

STATEMENT OF THE CASE.

The appellant, Stallings, was, during the year 1917, a United States Commissioner for the District of Wyoming. (R. 12–15.)

He was indicted by the grand jury on May 15, 1918, on eight counts, charging that on certain dates in 1917 he had received as such Commissioner from eight persons named eight separate sums of money to be paid over to the Receiver of the United States Land Office at Cheyenne, Wyoming, and had unlawfully converted the same to his use and fraudulently embezzled them. (R. 17–21.)

He was arrested on June 10, 1918, in the District of Columbia by the appellee, Splain, United States

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Marshal, on a bench warrant issued in Wyoming on this indictment. The amount of bail to be given was indorsed thereon to be $2,000. (R. 3, 22–23.)

He petitioned the Supreme Court of said District for a writ of habeas corpus, which was ordered to issue on June 11, 1918, returnable immediately. (R. 1, 2.)

The appellee, Splain, United States Marshal, responded on July 16, 1918, setting up said arrest on the Wyoming bench warrant on June 10, the issuance of said writ of habeas corpus, and that on June 11 petitioner was released under a bail bond in the sum of $2,000 for his further appearance on the hearing on said writ, said hearing being then continued to a later day. That on June 27, on removal affidavit before United States Commissioner Isaac R. Hitt, of the District of Columbia, setting up the commission of the same offenses charged in the Wyoming indictment, Stallings was arrested, and on July 5 came before said Commissioner for hearing. He admitted his identity and former official character and pleaded not guilty. The United States produced on its part a certified copy of the Wyoming indictment. Stallings, by his attorney, declined to offer evidence and moved for a discharge, which was denied. Thereupon he applied through his counsel to be admitted to bail for his appearance before the United States District Court for the District of Wyoming, and he was thereupon admitted to bail in the sum of $2,000, so conditioned, with George W. Ray as his surety. (R. 3, 4.)

The proceedings before Commissioner Hitt by petition for certiorari, were prayed to be sent up to the Supreme Court of the District of Columbia, to be used in connection with the hearing to be had on the application for habeas corpus set for July 23, 1918. The writ was granted and the entire record of these proceedings sent up to said Supreme Court of the District of Columbia. (R. 5–25.)

The cause came on to be heard both on the petition for writ of habeas corpus, the return thereto, and on the proceedings in certiorari, before Mr. Justice Siddons in said Supreme Court, on July 25, 1918. On August 20, 1918, said justice rendered a decree dismissing the petition for the writ of habeas corpus and discharging said writ; also dismissing the petition for certiorari, and remanding the proceedings, shown by said petition and return, to Commissioner Hitt for further action according to law. (R. 26.) Petitioner was admitted to bail in the sum of $2,000 pending appeal. An appeal was taken to the Court of Appeals of said District, and on said appeal the judgment below was affirmed. (R. 27–32.)

From that judgment an appeal is taken to this court. (R. 32–36.)

QUESTIONS INVOLVED.

The petition for this appeal states the legal questions relied on as authorizing the same. (R. 32.)

The errors assigned are set forth in appellant's brief (pp. 4–6), and are not repeated.

The questions raised are really these:

1. That he could not be lawfully arrested in the District of Columbia on the bench warrant issued from the United States District Court in Wyoming.

2. That while the hearing on the writ of habeas corpus was pending no proceedings could be lawfully taken before a United States Commissioner or court to have him removed to Wyoming for trial on the indictment pending in the United States District Court there.

3. That no arrest under the bench warrant, or under the warrant of Hitt, Commissioner, is lawful, because no offense is set up against any United States statute, and particularly against Criminal Code, section 97.

The charge is that certain moneys were paid to Stallings, as a United States officer, to be by him paid over to the Receiver of the Land Office at Cheyenne. The appellant contends that it is no part of the duty of Stallings as a Commissioner to receive and pay over such moneys and that in so doing he acted alone as an individual. Hence he did not violate the United States statutes.

ARGUMENT.

I.

The arrest under the bench warrant was legal and proper.

The warrant ran through the United States so as to permit an arrest.

2 Moore on Extr. sec. 540.

The defendant might have preferred to give bail to appear in the court in Wyoming, and thus obviate removal proceedings.

Rev. Stat. sec. 1014. (*Comp. Stat. 1916*, sec. 1674.)

If he did not so prefer, then a proceeding to obtain an order for removal would follow. (*Ib.*)

II.

That he was on bail pending a hearing on *habeas corpus* would not prevent a proceeding to be adopted as though no attempt to proceed on the bench warrant had been made. It at most could only amount to an abandonment of the arrest on the bench warrant and did not prevent the Commissioner from hearing the question of removal and ordering the same.

Peckham v. *Henkel*, 216 U. S. 483.

III.

But the defendant by voluntary action terminated all proceedings either on the *habeas corpus*, or on the removal proceedings.

He elected to secure his immediate release from caption and detention under either warrant by exercising his right to give bail for his appearance at the proper time before the court in Wyoming.

This ended any possibility of a question remaining in either the habeas corpus, or removal, proceedings. It remitted all questions on the indictment to the trial court.

IV.

But in this case, by the action of the defendant, the *habeas corpus* case and the removal proceedings were all brought before one judge in the court wherein the *habeas corpus* case was pending.

In that hearing on the whole matter it was shown—

(*a*) That an indictment had been duly found and a copy was introduced in evidence.

(*b*) The identity of the party arrested with the person indicted, and his former official character, were admitted. The accused introduced no evidence, but insisted that the indictment did not charge an offense against the United States. Such a showing required the grant of the order for removal.

Rumely v. *McCarthy*, 250 U. S. 283, 288.
Hyde v. *Shine*, 199 U. S. 62, 84.
Haas v. *Henkel*, 216 U. S. 462.

The objections here urged to the indictment were properly left to be ruled on by the court in which it was pending.

Beavers v. *Henkel*, 194 U. S. 73.
Benson v. *Henkel*, 198 U. S. 1.

(*c*) The indictment charged an offense against the United States.

Where an applicant for a patent to public lands appears before a United States Commissioner, who is then and there acting as such, and pays over to him moneys to be transmitted to the Receiver of the Land Office located in another place, and such Commissioner appropriates such money to his own use, the Commissioner is guilty of embezzlement.

The original statute, authorizing affidavits to be made before United States commissioners instead of before registers and receivers of the land offices, was an extension of Revised Statutes, section 2294, and reads as follows:

> In any case in which the applicant for the benefit of the homestead, preemption, timber-culture, or desert land law is prevented, by reason of distance, bodily infirmity, or other good cause, from personal attendance at the district land office, he or she may make the affidavit required by law before any commissioner of the United States circuit court or the clerk of a court of record for the county in which the land is situated, and transmit the same, with the fee and commissions, to the register and receiver. (Act May 26, 1890, c. 355, 26 Stat. 121.)

This statute was amended in 1904 so as to read as follows:

> Hereafter all proofs, affidavits, and oaths of any kind whatsoever required to be made by applicants and entrymen under the homestead, preemption, timber-culture, desert-land, and timber and stone Acts, may, in addition to those now authorized to take such affidavits, proofs, and oaths, be made before any United States commissioner or commissioner of the court exercising Federal jurisdiction in the Territory or before the judge or clerk of any court of record in the county, parish, or land district in which the lands are situated * * * The proof, affidavit, and oath, when

> so made and duly subscribed, or which may have heretofore been so made and duly subscribed, shall have the same force and effect as if made before the register and receiver, when transmitted to them with the fees and commissions allowed and required by law. (Act Mar. 4, 1904, c394, 33 Stat. 59; Compiled Stat., 1916, sec. 4546.)

Following the act of 1904, the General Land Office, Interior Department, issued a circular in March, 1905 (33 L. D. 480), which was revised and reissued in 1915. Each circular was addressed to the officers authorized to take affidavits, etc., and entitled "Suggestions to United States Commissioners," etc. A direction appears in paragraph 5 of each circular requiring final proofs taken by United States commissioners to be reduced to writing and forwarded by the officer to the register and receiver.

In the circular of 1905, among the directions to the officers occurs this one:

> Eighth. After proofs have been taken in the manner indicated, they should be duly authenticated and properly transmitted to the register and receiver with the necessary fees and commissions. (33 L. D. 480, 481.)

The circular of 1915 reads as follows:

> The officer who has taken a proof should, after duly certifying the papers, promptly transmit them to the register and receiver. In no case should the transmittal thereof be left to the claimant. (44 L. D. 350, 352.)

It is to be noted that under the act of 1890, above quoted, "he or she" (the applicant) "may make the affidavit required by law before any commissioner of the United States court * * * and transmit the same with the fees and commissions to the register and receiver."

This and all preceding requirements direct the *applicant* to transmit the affidavit and fees, etc.

The act of 1904 changes this language and states that the affidavits, proofs, and oaths may be taken before any United States commissioner (or other officer mentioned), and that "when so made and duly subscribed * * * shall have the same force and effect as if made before the register and receiver, *when transmitted* to them with the fees and commissions required by law." [Italics ours.]

This omits the direction to the applicant to transmit, and in place says "when transmitted."

The last circular makes this clear by ordering—

> 8. The officer who has taken a proof should, after duly certifying the papers, promptly transmit them to the register and receiver. In no case should the transmittal thereof be left to the claimant. (44 L. D. 350, 352.)

As the fees and commissions are directed by the statute to be transmitted with the papers, clearly a delivery of the amounts to the United States Commissioner for transmission with the papers to the Register and Receiver is contemplated by the statute and constitutes the receipt thereof an official act on

the part of the Commissioner, and brings the embezzlement directly within the denunciation of Criminal Code, section 97, which reads in part as follows:

> * * * any officer of the United States, or any assistant of such officer, who shall embezzle or wrongfully convert to his own use any money or property which may have come into his possession or under his control in the execution of such office or employment, or under color or claim of authority as such officer or assistant, whether the same shall be the money or property of the United States or of some other person or party, shall, where the offense is not otherwise punishable by some statute of the United States, be fined not more than the value of the money and property thus embezzled or converted, or imprisoned not more than ten years, or both. (Compiled Stat. 1916, sec. 10265.)

CONCLUSION.

The judgment of the court below should be affirmed.

ALEX. C. KING,
Solicitor General.

APRIL, 1920.

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